CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by California Wellness Plan, Holman Professional Counseling Centers, and Psychology Systems concerning the Department of Corporations' suspension of enforcement of the Knox-Keene Act for certain types of Employee Assistance Programs prior to the adoption of section 1300.43.14 of Title 10 of the California Administrative Code.[1]	1987 OAL Determination No. 9 [Docket No. 86-015] June 30, 1987 Determination Pursuant to Government Code Section 11347.5; Title 1, California Administrative Code Chapter 1, Article 2

Determination by:

LINDA HURDLE STOCKDALE BREWER, Director

John D. Smith, Chief Deputy Director/
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SYNOPSIS

The issue presented to the Office of Administrative Law was whether the Department of Corporations' policy suspending enforcement of the Knox-Keene Act's licensing requirements prior to the formal adoption of an exemption for certain types of Employee Assistance Programs was a "regulation" requiring adoption of the policy in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Department of Corporations' policy suspending enforcement of the Knox-Keene Act's licensing requirements for certain types of Employee Assistance Programs was invalid and unenforceable until properly adopted as a regulation.

THE ISSUE PRESENTED [2]

The Office of Administrative Law (OAL) has been requested to determine whether the Department of Corporations' (Department) policy suspending the enforcement of licensing requirements of the Knox-Keene Act pending the adoption of an exemption for certain Employee Assistance Programs contained in proposed Section 1300.43.14 of Title 10 of the California Administrative Code (CAC) is a "regulation" as defined in Government Code section 11342, subdivision (b) and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act (APA).

THE DECISION [3,4,5]

The Office of Administrative Law (OAL) finds that the above noted policy concerning the suspension of enforcement proceedings is (1) a "regulation" as defined in the APA, and (2) is subject to the requirements of the APA. However, between the date the policy was instituted and the date of this Determination, the exemption plicy was adopted as a regulation and filed with the the Secretary of State in accordance with the APA.[6, 7]

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The Department of Corporations' history may be traced back to the creation in 1913 of the State Corporation Department.[8] Today, the Department is responsible for administering a wide range of programs, including the Knox-Keene Act.[9]

The Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene Act)[10] provides for the regulation of health care service plans in California. Responsibility for the administration and enforcement of the Knox-Keene Act is vested in the Commissioner of Corporations[11], who is assisted by the Department's Health Care Service Plan Advisory Committee.[12]

Authority [13]

Health and Safety Code section 1344 provides in relevant part that:

> "The Commissioner may from time to time adopt, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this chapter, including rules governing applications and reports, and defining any terms, whether or not used in this chapter, insofar as the definitions are not inconsistent with the provisions of this chapter. For the purpose of rules and forms, the commissioner may classify persons and matters within the commissioner's jurisdiction, and may prescribe different requirements for different classes. The commissioner may waive any requirement of any rule or form in situations where in the commissioner's discretion such requirement is not necessary in the public interest or for the protection of the public, subscribers, enrollees, or persons or plans subject to this chapter...." [Emphasis added.]

Health and Safety Code section 1346 states that "The commissioner shall administer and enforce the provisions of this chapter...." and then enumerates specific powers related to administering the Knox-Keene Act.

Health and Safety Code section 1343 declares in pertinent part that:

> "(a) The provisions of this chapter shall apply to health care service plans and specialized health care service plan contracts as defined in subdivisions (f) and (n) of Section 1345.
>
> (b) The commissioner may by the adoption of such rules as deemed necessary and appropriate, either

> unconditionally or upon specified terms and conditions or for specified periods, exempt from the provisions of this chapter any class of persons or plan contracts if the commissioner finds such action to be in the public interest and not detrimental to the protection of subscribers, enrollees, or persons regulated under this chapter, and that the regulation of such persons or plan contracts is not essential to the purposes of this chapter." [Emphasis added.]

Under the above-noted code sections, the Commissioner has express rulemaking authority.

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."[14] Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department and the Commissioner.[15]

In any event, Corporations Code section 25614 makes clear that the Department's rulemaking is subject to the APA:

> "All rules of the commissioner (other than those relating solely to the internal administration of the Department of Corporations) shall be made, amended or rescinded in accordance with the provisions of the [APA]. . . ."

Background

The following undisputed facts and circumstances have given rise to the present determination.

In 1965 the Legislature passed the Knox-Mills Health Plan Act and delegated responsibility for regulating health plans to the Attorney General.[16] Under the Knox-Mills Act, the Attorney General's authority was limited to:

1. registering all health plans;[17]

2. reviewing all standard membership contracts for false or misleading statements;[18]

3. reviewing all health plan advertisements for false or misleading statements;[19]

4. examining (auditing) health plans to ensure financial solvency by making sure that adequate

tangible net equity funds were kept by each health plan.[20]

Passage of the Welfare and Medi-Cal Reform Acts in 1971 gave the State Department of Health regulatory control over group health plans that contracted with the state to provide health care for Medi-Cal recipients.[21] This resulted in a situation in which the Department of Health regulated the plans but the Attorney General registered them.

In 1965 there were fewer than twenty health plans in the state. By 1975 "State contracts and federal grants . . .caused the number of plans in California to increase nearly tenfold . . ."[22], with the majority of the increase occurring after 1971. As then Attorney General Evelle J. Younger stated in a letter to then Governor Edmund G. Brown Jr.:

> "This period of uncontrolled growth has also seen the failure of a number of health plans. The failures have occurred, in some instances, from malfeasance on the part of those responsible for the plans' operation, and in other cases, from simple mismanagement. In either case, the failure of the entity responsible for arranging patient care has caused disruption in the continuity of care, and has frequently caused the institution of collection actions by providers of health care services against patients for fees which the defunct plan was supposed to have paid. These actions have often been brought against union pensioners and others who are unable to pay, and who completely relied upon the plan to provide vital services. Many of these people are elderly, and unable to secure complete coverage due either to their age or health condition."[23]

In 1975 the Legislature repealed the Knox-Mills Health Plan Act and enacted the Knox-Keene Health Care Service Plan Act (Knox-Keene Act).[24] The Commissioner of the Department of Corporations was deemed to be the "best possible regulatory agent"[25] to administer the Act.

The express legislative intent and purpose in enacting the Knox-Keene Act is as follows:

> ". . .to promote the delivery of health and medical care to the people of the State of California to enroll in, or subscribe for the services rendered by, a health care service plan or specialized health care service plan by accomplishing all of the following:

(a) Assuring the continued role of the professional as the determiner of the patient's health needs which fosters the traditional relationship of trust and confidence between the patient and the professional.

(b) Assuring that subscribers and enrollees are educated and informed of the benefits and services available in order to enable a rational consumer choice in the marketplace.

(c) Prosecuting malefactors who make fraudulent solicitations or who use, deceptive methods, misrepresentations, or practices which are inimical to the general purpose of enabling a rational choice for the consumer public.

(d) Helping to assure the best possible health care for the public at the lowest possible cost by transferring the financial risk of health care from patients to providers.

(e) Promoting effective representation of the interests of subscribers and enrollees.

(f) Assuring the financial stability thereof by means of proper regulatory procedures.

(g) Assuring that subscribers and enrollees receive available and accessible health and medical services rendered in a manner providing continuity of care."[26]

Facts

The term Employee Assistance Program (EAP) is not specifically defined by statute. EAPs are generally characterized as programs providing assistance to employees who are experiencing problems which may negatively influence their work performance.

Employee Assistance Programs have many formats. The simplest may offer only one service, such as financial management advice, while a "traditional EAP" may identify a client's emotional and/or physical problems and refer the client to an appropriate treatment provider. "Full service EAPs," sometimes referred to as "Mental HMOs" may identify, diagnose and treat the client and have more prolonged contact with the client. Many EAPs offer health services, especially alcohol abuse and mental health counseling services.

If the EAP's plan

> ". . .undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for such services, in return for a prepaid or periodic charge paid by or on behalf of such subscribers or enrollees"[27]

then it constitutes a "health care service plan" (HCSP) requiring a Knox-Keene license in order to legally operate in California.

If the EAP's plan contract is for

> ". . .health care services in a single specialized area of health care, including dental care, for subscribers or enrollees, or which pays for or reimburses any part of the cost for such services, in return for a prepaid or periodic charge paid by or on behalf of such subscribers or enrollees"[28]

then it is a "specialized health care service plan contract" requiring a Knox-Keene license in order to legally conduct business in California.

In August of 1985, the Association of Labor-Management Consultants and Administrators on Alcoholism, Inc. (ALMACA) petitioned the Department to exempt certain types of EAPs from Knox-Keene licensing while arguing that "traditional EAPs" were outside the scope of the Knox-Keene Act.[29] The Department denied the petition ". . . because it appeared that the terms of the exemption, as proposed by ALMACA, would only have applied to an EAP which was not an HCSP as defined in the Act and thus its adoption would serve no purpose."[30] However, ALMACA was advised that the Commissioner would consider the issue of an exemption.[31]

On November 4, 1985, Senior Corporations Counsel, Alberto V. Esteva, sent a letter to Mr. Theodore Guth regarding Brownlee Dolan Stein Associates. The letter explained that the Department was presently considering the adoption of an exemption for certain EAPs and declared that the

> ". . .Department is presently suspending its enforcement of the Act, as it applies to programs which reasonably come within the proposed Rule, pending the final adoption of the Rule providing for the exemption. Please inform us whether the programs being offered by your client come within the Rule, and, if they do, then Brownlee Dolan Stein Associates need not comply with the commitment it made in your letter of August 8, 1985

as to such types of programs. . . ."[32] [Emphasis added.]

On April 11, 1986, the Department published a notice in the California Administrative Notice Register of the proposed adoption of an exemption for specified types of EAPs.[33]

On November 26, 1986, Mr. James E. Prosser, Esq., of Organization Management Inc., filed a Request for a Determination with OAL that challenged the Department's letter as "an invalid attempt to enforce a defacto rule. . ."[34] which was not adopted in compliance with the APA. Mr. Prosser filed the Request on behalf of three EAPs which are licensed under the Knox-Keene Act. It was alleged that as a direct result of obtaining the exemption status, Brownlee Dolan Stein Associates was awarded a contract with the Los Angeles Unified School District to provide EAP services.[35]

The Request further declares that "the petitioners are informed and believe that the Department has issued and continues to issue letters of exemption similar to . . .[Mr. Esteva's November 4, 1987, letter] to other EAP providers, even though they are legally required to be licensed under the Act."[36]

Following extensive public comments, the Department modified the language of the proposed regulation. The Department then determined that the revisions were not sufficiently related to the original text and therefore the public was not adequately placed on notice that such changes might be made to the originally proposed regulation.[37] The Department renoticed the proposed adoption of section 1300.43.14 of Title 10 of the CAC on January 16, 1987, thereby reinitiating the rulemaking process.[38]

On June 8, 1987, the Department filed its Response with OAL. It was asserted that the Department's decision to suspend enforcement activity was non-regulatory because; (1) it was an internal management policy; (2) Mr. Esteva's letter was directed to a specifically named person or to a group of persons (Gov. Code, §11343, subd. (a)(3)); and (3) the Department did not implement its proposed exemption regulation prior to its approval and rejected any and all attempts to file notices claiming the exemption. The Department further argued that if OAL were to approve its regulatory filing, the issue would be moot.[39]

The regulatory action adopting section 1300.43.14 of Title 10 of the CAC was approved by OAL and filed with the Secretary of State on June 12, 1987. OAL granted the Department's request that the regulation be effective upon filing.[40]

II. PRELIMINARY ISSUE: WHETHER THE DEPARTMENT OF CORPORATIONS HAS JURISDICTION OVER EAPS.

The comment received from ALMACA argues that the Department lacks jurisdiction over EAPs and therefore suspending enforcement proceedings was necessary in order that the Department not exceed its statutory authority. The comment states "The language of the Knox-Keene Act is consonant only with regulation of HMO-type (Health Maintenance Organization) entities, not EAPs. Most notably the Knox-Keene Act, which is modeled after the federal HMO Act (42 U.S.C. §300e et seq.), expressly excludes entities such as traditional EAPs, which do not furnish health care services pursuant to a contract."[41] (Emphasis added.)

Although the commentor asserts the Knox-Keene Act "expressly excludes" certain types of traditional EAPs, a review of the applicable law reveals no express exclusion. The Knox-Keene Act applies to Health Care Services Plans (HCSP) as defined in Health and Safety Code section 1345, subdivision (f):

> "'Health care service plan' means any person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for such services, in return for a prepaid or periodic charge paid by or on behalf of such subscribers or enrollees." [Emphasis added.]

The phrases "arrange for" and "pay for" are in the disjunctive and therefore a plan may arrange for services without paying for them and still come within the definition of an HCSP. Thus, if a plan makes a prepaid or periodic charge for arranging for health care services by making referrals to the provider network identified and utilized by the plan, it is subject to the Knox-Keene Act's licensing requirements regardless of whether it is a "traditional EAP" or "full service EAP," unless a specific exemption exists.

If an individual EAP does not meet the statutory definition of an HCSP, then obviously it is outside the jurisdiction of the Act.

The commentor further asserts that even if EAPs were found to be within the Department's jurisdiction, state jurisdiction over "full service EAPs" would be pre-empted by the federal Employee Retirement Income Security Act of 1974 (ERISA).[42]

> "ERISA is a broad-based legislative scheme designed to protect interstate commerce, the federal taxing power, and the interests of participants in private employee benefit plans and their beneficiaries."[43]

Because the Department's policy of suspending enforcement was directed only to "traditional EAPs," this issue is not relevant to our Determination.[44]

III. DISPOSITIVE ISSUES

There are two main issues before us:[45]

(1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, does the informal rule either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

The answer to both parts of this inquiry is "yes."

Mr. Esteva's November 4, 1985, letter stated that "[T]he Department is presently suspending its enforcement of the Act, as it applies to programs which reasonably come within the proposed Rule, pending the final adoption of the Rule providing for exemption. . . ."[46] (Emphasis added.) This policy therefore was being applied not only to the named recipient of the letter, i.e., Mr. Guth who was representing Brownlee Dolan Stein Associates, but also applies to all EAPs which would "reasonably come within the proposed Rule." There is no doubt that this policy is therefore a standard of general application. The fact that the letter was addressed to a specific recipient does not lessen the statewide impact on other EAPs.

The Department asserts that it

> "did not then and has not at any time since granted to any EAP an exemption from licensing under the Knox-Keene Act. The Department has continued to inform interested parties that no exemption is yet in effect and that none can by granted until an exemptive rule is in effect. (Copies of correspondence with the petitioner and High Desert Counseling Services are included as exhibits to illustrate this point.)"[47]

Section 1300.43.14, subdivision (c) contains a form captioned "Notice of Employee Assistance Program Exemption." The fact that the Department has rejected attempts to file formal notices of exemption, and has not formally granted any exemptions does not render its policy suspending enforcement proceedings under the Knox-Keene Act non-regulatory. It is the policy of suspending enforcement that creates an illegal rule by giving certain EAPs the premature benefit of an exemption not yet formally adopted in compliance with the APA.[48]

Health and Safety Code section 1343, subdivision (b) states that:

> "The Commissioner may by the adoption of such rules as deemed necessary and appropriate, either unconditionally or upon specified terms and conditions or for specified periods, exempt from the provisions of this chapter any class of persons or plan contracts if the commissioner finds such action to be in the public interest and not detrimental to the protection of subscribers, enrollees, or persons regulated under this chapter, and that the regulation of such persons or plan contracts is not essential to the purposes of this chapter."

In proposing an exemption for certain specified types of EAPs the Department implemented Health and Safety Code section 1343, subdivision (b), and made specific its provisions by determining that certain EAP's would be partially exempt from the Knox-Keene Act.

Therefore, the policy of suspending the enforcement of the Knox-Keene Act clearly implements, interprets, or makes specific the law enforced or administered by the Department.[49].

WE CONCLUDE THAT THE DEPARTMENT HAS JURISDICTION OVER EAP'S THAT MEET THE CRITERIA CONTAINED IN HEALTH AND SAFETY CODE SECTION 1345, SUBDIVISIONS (f) AND (n), AND THAT THE DEPARTMENT'S POLICY OF SUSPENDING ENFORCEMENT OF THE KNOX-KEENE ACT PENDING ADOPTION OF SECTION 1300.43.14 IS A STANDARD OF GENERAL APPLICATION AND IMPLEMENTS AND MAKES SPECIFIC HEALTH AND SAFETY CODE SECTION 11343, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[50]

Both the Department's Response and ALMACA's comment assert that the policy of suspending enforcement is related to the "internal management of the Department. . . ."[51]

The Department argued that:

> "Section 1391 of the Health and Safety Code provides that the Commissioner <u>may</u> issue an order directing a plan to cease and desist from engaging in any act or practice in violation of the provisions of the Knox-Keene Act. If such a cease

> and desist order is issued, the person receiving the order has up to one year to file a request for a hearing before the order becomes final. If a request for hearing is filed, the request automatically stays the effect of the order to the extent the order requires the cessation of operation of the plan.
>
> Since the Commissioner's enforcement authority is discretionary rather than mandatory, the Commissioner may exercise discretion by deciding to suspend enforcement activity as the Commissioner sees fit unless doing so constitutes an abuse of discretion under the circumstances. Without going into the legal standards by which an abuse of discretion is determined (since it has not been alleged that there has been an abuse of discretion), suffice it to say that deciding to suspend enforcement activities temporarily against entities without a license which the Commissioner anticipates will be exempt from licensure requirements by a pending rule does not constitute an abuse of discretion under the circumstances. The reasonableness of such a decision is further confirmed by the enforcement scheme in Section 1391, which gives persons up to a year to file for a hearing and provides for automatic stay of the Commissioner's order when a request for hearing is made. The Commissioner had every reason to believe at the outset that the rulemaking procedure would be completed within the one year period during which a hearing could be requested, therefore to proceed with enforcement would have been futile. Furthermore, to seek enforcement of licensure requirements against entities expected to be exempt from licensure would be both a waste of taxpayer dollars and a waste of the fiscal resources of those entities."[52]

In Armistead v. State Personnel Board[53] the court concluded that the "Personnel Transaction Manual" rule governing withdrawal of state employees' resignations was not within the "internal management" exception because the rule in issue applied to all state civil services employees. In Stoneham v. Rushen[54] (Stoneham I) the court found that a challenged rule which affected inmate classification was not within the internal management exception but rather that it was a rule of general application.

Therefore, it is clear from Armistead and Stoneham I that "policies" which effect a class of persons other than the employees of the originating agency do not fall within the internal management exception. According to Poschman v. Dumke[55] which dealt with a rule giving a university

chancellor the final decision in the granting of faculty tenure, the court stated the "better reasoned view is to regard the 'internal management' [exception] narrowly so as to encompass [only] accounting techniques and the like."[56]

The challenged Departmental policy affects a class of persons outside the staff of the Department: i.e., all EAPs that benefitted from the Department's policy to suspend enforcement activities. Although the Department details logical benefits resulting from its policy, that fact does not create an exemption from the APA.

The Department argues that even if its policy of suspending enforcement were regulatory, the policy would be exempt under Government Code section 11343, subdivision (a)(3) because Mr. Esteva's letter of November 4, 1985, was addressed to a specifically named person, i.e., Mr. Guth, who was representing Brownlee Dolan Stein Associates.[57]

Government Code section 11343, subdivision (a)(3) provides in relevant part that:

> "Every state agency shall:
>
> (a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted by it except one which:
>
> (3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." [Emphasis added.]

The two pronged test of section 11343, subdivision (a)(3) must be met before this exemption would apply. The two criteria are:

1. Whether there is a specifically named person or group of persons, and

2. Whether the challenged rule applies generally throughout the state?

A close examination of Mr. Esteva's letter reveals that, although it was addressed to only one recipient, the policy was articulated as a standard of general application, i.e.,:

> "[T]he Department is presently suspending its enforcement of the Act, as it applies to programs which reasonably come within the proposed Rule, pending the final adoption of the Rule providing for the exemption. . . . Please inform us whether

> the programs being offered by your client come within the Rule. . ."[58] [Emphasis added.]

It could be argued that since Mr. Estava's letter refers to ". . . programs being offered by your client . . . , " the letter and policy of suspension of enforcement was directed only to a specifically named individual. This is not persuasive because the statement ". . . is presently suspending its enforcement of the Act, as it applies to programs . . ." is general in scope and states a policy applicable to any "programs which reasonably come within the proposed rule. . . ."

This interpretation is confirmed by the Department's statement in its Response that:

> "[A]n internal decision to suspend further activity on pending enforcement cases involving Employee Assistance Program ("EAPs") which were not licensed under the Knox-Keene Health Care Service Plan Act of 1975 ("Knox-Keene") was reached on or about November 1, 1985 by the Commissioner of Corporations and executive staff members. . . ."[59] [Emphasis added.]

Since the Department states the policy applies to "pending enforcement cases," it is obvious that the exemption for regulations applying to "a specifically named person or to a group of persons . . ." (Gov. Code, §11343, subd. (a)(3)) does not apply and the policy is a rule or standard of general application.

The challenged action by the Department affects all EAPs statewide who contemplate applying for an exemption from Knox-Keene licensing. The fact that the Department's letter has only been sent to one person is not dispositive. Though one individual member of this group may have been identified, the group is nonetheless an "open class"[60] whose individual members are affected by the challenged policy.

In our analysis, supra, we have already concluded that the challenged rule applies generally statewide; hence, we find that the Department's challenged rule does not meet either of the two prongs as set out above.

We therefore conclude that none of the recognized exceptions (set out in note 50) apply to the Department's challenged policy of suspension.

IV. EFFECT OF ADOPTION OF SECTION 1300.43.14 OF TITLE 10 OF THE CALIFORNIA ADMINISTRATIVE CODE

On June 12, 1987, OAL approved and filed with the Secretary of State newly adopted section 1300.43.14 of Title 10 of the

CAC.[61] This section was adopted by the Department pursuant to the APA. Section 1300.43.14 describes when EAPs that have a Health Care Service Plan

> ". . .pursuant to a contract with an employer, labor union or licensing board within the Department of Consumer Affairs, [and] consults with employees, members of their families or licensees of such board to identify their health, mental health, alcohol and substance abuse problems and refer them to health care providers and other community resources for counseling, therapy or treatment. . ."

are exempt from most of the provisions of the Knox-Keene Act, with the exception of requirements contained in Health and Safety Code sections 1360, 1360.1, 1368 and 1381 which relate to advertising, client grievance procedures and the inspection of records by the Commissioner. The regulation also contains definitions, an exemption form, disclosure requirements, and a provision that no prepaid fees shall be collected more than 45 days in advance.

The effect of the adoption of section 1300.43.14 is that the Department's policy suspending enforcement of the Knox-Keene Act was rendered valid and enforceable on June 12, 1987.

V. CONCLUSION

For the reasons set forth above, OAL finds that the Department of Corporations' policy of suspending enforcement of the Knox-Keene Act[62], is (1) subject to the requirements of the APA, and (2) is a "regulation" as defined in the APA. However, between the date the policy was instituted and the date of this Determination, the exemption policy was adopted as a regulation by the Department and filed with the Secretary of State in accordance with the APA.[63]

DATE: June 30, 1987

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1 In this proceeding, James E. Prosser, Esq., of Organization Management, Inc., 1121 L Street, Suite 500, Sacramento, California 95814, (916) 447-4113, represented California Wellness Plan, Holman Professional Counseling Centers and Psychology Systems (Requesters). The Department of Corporations was represented by William Kenefick, Assistant Commissioner.

2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-011), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 236 Cal.Rptr. 853, 857 the Third District Court of Appeal found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute. Note: The California Supreme Court retains jurisdiction to grant a hearing in Johnston until July 10, 1987. (See Cal. Rules of Court, rules 24, 27, 28, subds. (a) and (b), 976, subd. (d).)

3 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative

proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall be published in the California Administrative Notice Register and be made available to . . . the courts." [Emphasis added.]

4 One timely public comment was received from Andrea J. Wooten, Esq., of the law firm of Orrick, Herrington & Sutcliff, 555 Capitol Mall, Sacramento, California 95814, (916) 447-9200, on behalf of the Association of Labor-Management Consultants and Administrators on Alcoholism, Inc. (ALMACA). The comment argued that both "traditional EAPs" and "mental HMOs," i.e., "full service EAPs" (which would include the Requesters) are exempt from the Department's jurisdiction, although on different grounds. It was further argued that the suspension

> "policy relates only to the internal management of the DOC's [Department] enforcement. It is neither a rule of general application nor an interpretation or implementation of the Knox-Keene Act. Therefore, there is nothing improper in DOC's limited forebearance fromenforcement until such time as the final exemption rule is adopted.: ALMACA comment at page 7.
>
> The comment, although challenging the Department's jurisdiction, supports the Department's suspension policy, and was considered in making this Determination. It should be noted that the commentor raised the same issues during the rulemaking that led to section 1300.43.14 and was generally in favor of the concept of an exemption. (OAL File No. 87-0608-02.)

A timely Response to the Request for Determination was received from William Kenefick, Assistant Commissioner of the Department and was considered in making this Determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

5 An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.

6 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

7 On June 8, 1987, the Department submitted the rulemaking file which related to the adoption of section 1300.43.14 of Title 10 of the CAC to OAL. The regulatory action was approved by OAL and filed with the Secretary of State on June 12, 1987. OAL granted the Department's request for an effective date upon filing.

The Department's request for an accelerated effective date for section 1300.43.14 contained the following reasons:

> "1. Many plans have already modified their Employee Assistance Program provisions to comply with the substance of the rule.
>
> 2. Accelerated effectiveness of the rule will remedy lingering confusion in the minds of the public which may have arisen as to the legality of certain EAPs to bid for contracts without being licensed under the Knox-Keene Act.
>
> 3. Accelerated effectiveness will moot the controversy over whether the Department of Corporations has implemented an underground regulation.
>
> Therefore, we respectfully request that the Office of Adminstrative Law allow this regulation to become effective upon filing with the Secretary of State." OAL file no. 87-0608-02.

8 Statutes of 1913, Chapter 353, section 16, page 720. In 1945 the State Corporation Department became the Division of Corporations. (Stats. 1945, Ch. 1185, §6, p.2236.) In 1969 the Division became the Department of Corporations. (Stats. 1969, Ch. 138, §24, p. 296.)

9 The following non-inclusive list cites some of the Acts administered by the Department of Corporations: "Corporate Securities Law of 1968: (Corp. Code, §§ 25000 et seq.); "Bucket Shop Law" (Corp. Code, §§ 29000 et seq.); "Check

Sellers, Bill Payers and Proraters Law" (Fin. Code, §§ 12000 et seq.); "Commercial Finance Lenders Law" (Fin. Code, §§ 26000 et seq.); "California Credit Union Law" (Fin. Code, §§ 14000 et seq.); "Escrow Law" (Fin. Code, §§ 17000 et seq.); "Franchise Investment Law" (Corp. Code, §§ 31000 et seq.); "Industrial Loan Law" also known as "Thrift and Loan Law" (Fin. Code, §§ 18000 et seq.); "Knox-Keene Health Care Service Plan Act of 1975: (Health & Saf. Code, §§ 1340 et seq.); "Personal Property Brokers Law" (Fin. Code, §§ 22000 et seq.); and the "Securities Depository Law" (Fin. Code, §§ 30000 et seq.).

10 Health and Safety Code sections 1340 et seq.

11 Health and Safety Code section 1341.

12 Health and Safety Code Section 1341. Note that Health and Safety Code section 1342.5 requires the Commissioner of Corporations to

> ". . .consult with the Insurance Commissioner prior to adopting any regulations applicable to health care service plans subject to this chapter. . . and other entities governed by the Insurance Code for the specific purpose of insuring to the extent practical, that there is consistency of regulations applicable to these plans and entities by the Insurance Commissioner and the Commissioner of Corporations."

13 We discuss the affected agency's rulemaking authority (see Gov. Code, § 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Administrative Code, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster

under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that point in time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, § 11349.1.)

14 Government Code section 11342, subdivision (a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

15 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.

16 Knox-Mills Health Plan Act of 1965 (former Gov. Code, §§ 12530 et seq.). See also: "Group Health Plans in California: Who Regulates?" April, 1974 Staff Report of the Senate Subcommittee on Medical Education and Health Needs.

17 Former Government Code section 12537.

18 Former Government Code section 12532.

19 Former Government Code section 12532.

20 Former Government Code section 12538.2.

21 "Group Health Plans in California: Who Regulates?" April 1974 Staff Report of the Senate Subcommitte on Medical Education and Health Needs, at page 3. The study recommended that: (1) the Department of Health regulate the medical and health care standards of both health insurance coverage and health plans; (2) remove the responsibility of registration from the Attorney General's Office: and (3) delegate the

responsibility of auditing, supervising advertising, contract terms and reserve requirements for both health insurers and prepaid health plans to the Department of Insurance. ("Study" at pp. 33-34.)

22 Letter from Evelle J. Younger, Attorney General to Governor Edmund G. Brown, dated September 12, 1975.

23 Id.

24 Health and Safety Code sections 1340 et seq., operative July 1, 1976.

25 In a letter from Senator John T. Knox to Governor Edmund G. Brown Jr. dated September 11, 1975, Senator Knox detailed the following reasons for selecting the Commissioner of the Department of Corporations to administer the Knox-Keene Act:

> ". . .he already has responsibility for the regulation of a number of types of businesses which require a staff of persons expert in financial affairs. And, since it is the financial operations of health plans which have been the major source of failure in the past, it is logical to place this regulatory responsibility under him. Additionally, it should be noted that the Corporations Code was used initially as the model for a number of the provisions of AB 138 [the Knox-Keene Act]. . . . Also, as noted in testimony before the Senate Health Committee, the major state contractor in the field of prepaid health plans (the Department of Health) has been unable in the past to efficiently deal with the financial aspects of health care delivery by prepaid health plans."

26 Health and Safety Code section 1342.

27 Health and Safety Code section 1345, subdivision (f).

28 Health and Safety Code section 1345, subdivision (n).

29 Final Statement of Reasons and ALMACA Petition (Exhibit A), OAL file No. 87-0608-02.

30 Final Statement of Reasons, OAL File No. 87-0608-02.

31 Id.

32 Exhibit A, Request for Regulatory Determination filed by James E. Prosser, Esq.

33 California Administrative Notice Register 86, No. 15-Z, April 11, 1986; p. A-4.

34 Request for Regulatory Determination filed by James E. Prosser, Esq.

35 Id.

36 Id.

37 Government Code section 11346.8, subdivision (c). "Changes to the original text of a regulation shall be deemed to be 'sufficiently related,' as that term is used in Government Code section 11346.8, if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted." (Cal. Admin. Code, tit.1, § 42.)

38 California Administrative Notice Register 87, No. 3-Z, January 16, 1987; p. A-7.

39 Department's Response, at pages 1-3.

40 OAL File No. 87-0608-02.

41 ALMACA comment on Request for Regulatory Determination, at page 7.

42 Id., at page 10.

43 Hewlett-Packard Co. v. Barnes (N.D.Cal. 1977) 425 F.Supp. 1294, 1297, cert. denied, October 2, 1978, 439 U.S. 831, 58 L. Ed.2d 125.

44 Assuming arguendo that the issue of whether or not "full service EAPs" were preempted by ERISA was properly before us, the ALMACA comment does not contain any specific facts about a particular "full service EAP." Without specific facts, an ERISA preemption analysis would be foreclosed. A brief summary of relevant ERISA cases follows:

> In Hewlett-Packard Co. v. Barnes (N.D. Cal. 1977) 425 F.Supp. 1294, the plaintiffs offered self-funded plans which reimbursed 80% or more of certain health care expenses independently contracted for and incurred by their employees, annuitants, and covered dependents in California and other states. The court found the plans to be an "employee welfare benefit plan" within the meaning of ERISA and also to be a "health care service plan" under the Knox-Keene Act. The court held that the specific employee benefit plans which were self-funded were preempted by ERISA.
>
> In In re Marriage of Johnston (1978) 85 Cal.App.3d 900, 910, 149 Cal.Rptr. 798, 804, the court narrowly construed Hewlett as holding that "all state regulation and administration of pension plans was intended to be preempted by this legislation [ERISA]." [Emphasis added.]
>
> In the most recent United States Supreme Court case interpreting ERISA, Fort Halifax Packing Co. v. Coyne (1987) 47 CCCH S.Ct. Bull. B2940, the court examined a Maine statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing. The court analyzed the plain language of ERISA's pre-emption provision, the underlying purpose of the provision, and the overall objectives of ERISA. The court held that the Maine statute was not pre-empted "because the statute neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' under that federal statute." [Emphasis added.] (p. B2943.) The court reasoned that:
>
> > "[C]ongress intended pre-emption to afford employers the advantage of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however with respect to benefits whose provision by nature requires an on-going administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted laws relating to plans, rather than simply to benefits." (p. B2948.)

45 See Faulkner v. California Toll Bridge Authority (1953) 40

Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

46 Exhibit A of Request for Regulatory Determination filed by James E. Prosser, Esq.

47 Department's Response, at page 1.

48 Planned Parenthood v. Swoap (1985) 173 Cal.App.3d 1187, 219 Cal.Rptr. 664.

49 Goleta Valley Community Hospital v. State Department of Health Services (1983) 149 Cal.App.3d 1124, 197 Cal. Rptr. 294.

50 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

a. Rules relating only to the internal management of the state agency. (Gov. Code, § 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, § 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, § 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, §11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, § 11342, subd. (b).)

f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376,

88 Cal.Rptr. 12, 20 (Sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions.

51 Department's Response, at pages 1-3: ALMACA comment at page 7.

52 Department's Response, at page 2.

53 Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.

54 Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

55 Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596.

56 Id., at 31 Cal.App.3d 943, 107 Cal.Rptr. 603: See 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986.

57 Department's Response, at pages 2-3.

58 Exhibit A, Request for Regulatory Determination filed by James E. Prosser, Esq.

59 Department's Response, at page 1.

60 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324.

61 OAL File No. 87-0608-02.

62 Department's Response, at page 1 states that

> "An internal decision to suspend further activity on pending enforcement cases involving Employee Assistance Programs ("EAPs") which were not licensed under the Knox-Keene Health Care Service Plan Act of 1975 ("Knox-Keene") was reached on or about November 1, 1985 by the Commissioner of Corporations and executive staff members. . . ."

63 Section 1300.43.14 of Title 10 of the California Administrative Code was effective on filing on June 12, 1987. OAL File No. 87-0608-02.